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No. 73-1915

In the Supreme Court of the United States

OCTOBER TERM, 1974

LESTER L. PERKINS, D.V.M., APPELLANT

v.

HOWARD SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the federal appellees move that the judgment of the district court be affirmed.

STATEMENT

Appellant, an alien, is a "permanent resident" of the United States now residing in Maryland.[1] Alleging that, except for his lack of citizenship, he is in all respects otherwise qualified for service on federal and Maryland grand and petit juries, he instituted this action in the

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[1]The record does not reveal when appellant entered the United States, his immigration status at that time, nor when he became eligible to seek citizenship, although he does assert that he graduated from college in 1964 and received his college training entirely in the United States (Complaint, para. 2). Appellant filed a declaration of intention to become a citizen in the United States District Court for the District of Columbia on June 14, 1971 *(ibid.)*. The filing of such a declaration is optional and has no bearing on an alien's eligibility for naturalization. See 8 U.S.C. 1445(f).

United States District Court for the District of Maryland,[2] challenging the constitutionality of federal and Maryland statutes that render him ineligible to serve on federal and state jury panels solely because of his alienage, and seeking to enjoin enforcement of the citizenship requirements thereof, on the ground that such limitations violate the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution.

A three-judge district court, convened pursuant to 28 U.S.C. 2281 and 2282, after declining to certify the suit as a class action (J.S. App. 12), rejected appellant's constitutional contentions and granted appellees' motion for summary judgment (J.S. App. 21).

ARGUMENT

The district court properly entered judgment for the federal appellees and the appeal presents no substantial federal question warranting plenary review by this Court.

1. At common law, aliens were ordinarily ineligible for service on juries, both in England and in the States. See, *e.g.*, *Kohl* v. *Lehlback*, 160 U.S. 293, 300; *Hollingsworth* v. *Duane*, 4 Dall. 353 (C.C. Pa.); *Hinton* v. *Hinton*, 196 N.C. 341, 342, affirmed, 145 S.E. 615; 1 R.C.L. 802 (1914).[3] Because the Constitution's recognition of a right to trial by jury has not been regarded as incorporating the

[2]At the time he filed his complaint, appellant had resided in the State of Maryland for over fourteen months (Complaint, para. 2).

[3]In England, a limited exception had been created by statutes providing that, if an alien were a party, he could request a jury *de medietate linguae, i.e.*, a jury consisting half of aliens. See generally Forsyth, *History of Trial by Jury* 228-230 (1852); Thompson & Merriam, *Juries* 18-19 (1882). Although the right to such a jury was once recognized by statute in a few states (*e.g.*, *United States* v. *Carnot*, 2 Cranch C.C. 469, 470 (C.C.D.C.) (applying Virginia law); *United States* v. *Cartacho*, 25 Fed. Case. (No. 14,738) 312, 313 (C.C. Va.) (same)), in most jurisdictions it either was not recognized or was abolished (*e.g.*, *United States* v. *McMahon*, 4 Cranch C.C. 573 (C.C.D.C.)(Maryland law); Thompson & Merriam, *supra*, at 19), it was never adopted by Congress, and for may years it has not existed. *United States* v. *Wood*, 299 U.S. 123, 145.

common law rules concerning service of aliens on juries (cf. *Williams* v. *Florida*, 399 U.S. 78, 92-99), both the federal government and the states were free to include or exclude aliens from juries, as they chose, and in most jurisdictions the common law ineligibility of aliens for jury service remained the rule. As this Court recently observed, nearly every state now requires jurors to be citizens of the United States (*Carter* v. *Jury Comm'n*, 396 U.S. 320, 333), and a similar citizenship requirement has existed for jurors in federal court since 1948. 62 Stat. 951, as amended, 28 U.S.C. 1861, 1865(b)(1).[4]

2. For nearly a century this Court has repeatedly stated that eligibility for service on federal and state juries may be limited to citizens. *E.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 310; *Neal* v. *Delaware*, 103 U.S. 370, 386; *In re Shibuya Jugiro*, 140 U.S. 291, 297; *Balzac* v. *Porto Rico*, 258 U.S. 298, 310; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223-224, 232; *Fay* v. *New York*, 332 U.S. 261, 266, 272, 291; *Brown* v. *Allen*, 344 U.S. 443, 470-471; *Carter* v. *Jury Comm'n*, *supra*, 396 U.S. at 332-333. Aliens have never

[4]Previously, qualifications for jurors in federal courts were governed by state law. Thus the first Judiciary Act of 1789 (1 Stat. 88) provided that jurors should have the same qualifications as jurors in the state of which they were "citizens." Subsequent enactments referred to the law of the state in which the court was located. *E.g.*, 5 Stat. 394. The change in 1948 came in response to a recommendation in 1942 by the Knox Committee of the Judicial Conference (see H. Rep. No. 308, 80th Cong., 1st Sess., p. A156), which had proposed uniform federal juror qualifications, including citizenship. See Vanderbilt, *Minimum Standards of Judicial Administration* 150-153 (1949). By that time there were only a few states in which non-citizens could be jurors. See Gibson, *Aliens and the Law* 144-151 (1940). As early as 1865 Congress had required that jurors in courts in the District of Columbia be citizens. 12 Stat. 429; see 11 D.C. Code 1901 (incorporating federal court qualifications).

been held by this Court to constitute one of those "groups" in a community whose systematic and intentional exclusion deprives juries of their fundamental representative nature (see *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 220), nor has alienage been regarded as a criterion not "relevant" to the functions of a jury, and hence impermissible. *Carter* v. *Jury Comm'n*, *supra*, 396 U.S. at 332.

3. Appellant contends, in substance, that this Court's past statements concerning the permissibility of juror qualifications that exclude aliens have been entirely superseded by the recent decisions holding that various restrictions pertaining to aliens under state law constituted impermissible discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Graham* v. *Richardson*, 403 U.S. 365 (emergency medical care); *Sugarman* v. *Dougall*, 413 U.S. 634 (state civil service employment); *In re Griffiths*, 413 U.S. 717 (bar membership). In fact, however, the case most in point, *Sugarman* v. *Dougall*, confirms the continued validity of state or federal laws limiting jury service to citizens.

Thus, the Court recognized in *Sugarman* the "historical power [of a state] to exclude aliens from participation in its democratic political institutions" (413 U.S. at 648), including such participation through voting, holding high public office, or employment (*id.* at 648-649), "for alienage itself is a factor that reasonably could be employed in defining [a state's] 'political community.' " *Id.* at 649.

The jury, of course, is a governmental institution of "fundamental" importance. *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 153. Juries are "instruments of public justice" (*Smith* v. *Texas*, 311 U.S. 128,

130), and provide a means of "community participation in the determination of guilt or innocence" (*Duncan* v. *Louisiana*, *supra*, at 156), the development of which is closely related to "our basic concepts of a democratic society and a representative government." *Glasser* v. *United States*, 315 U.S. 60, 85. The "obligation * * * to share in the administration of justice" (*Thiel* v. *Southern Pacific Co.*, *supra*, 328 U.S. at 232 (Frankfurter, J., dissenting)), through jury service, is a "civic duty." *Brown* v. *Allen*, *supra*, 344 U.S. at 474. The jury expresses the "conscience of the community" (*Witherspoon* v. *Illinois*, 391 U.S. 510, 519), and provides an institution through which laymen may in effect operate as a branch of the government to protect against arbitrary action by the other branches of government. *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 155-156.

In sum, jury service is a form of participation in the processes of democratic political institutions that, under *Sugarman* v. *Dougall*, supra, 413 U.S. at 649, may properly be limited to a "political community" consisting only of persons owing allegiance to that community. Aliens owe allegiance to a political community other than the United States. In view of the nature and functions of a jury, it is not constitutionally forbidden to require that jurors have that allegiance and commitment to the Constitution, laws and traditions of the community that is best assured by the objective requirement of citizenship. *Cf. Balzac* v. *Porto Rico*, *supra*, 258 U.S. at 310.

4. A federal requirement of citizenship for service on a federal jury would be constitutional even if a similar state requirement were not. In *Weinberger* v. *Diaz*, No. 73-1046, probable jurisdiction noted May 13,1974,

and *Hampton* v. *Mow Sun Wong*, No. 73-1596, certiorari granted June 10, 1974, we are contending that, in view of the Constitutional prerogatives of the federal government to regulate with respect to aliens, federal laws and regulations based on alienage are subject to different constitutional standards than are comparable state requirements, and may be constitutional where the latter would be invalid. Our contentions in those cases are equally applicable here.[5]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[5]We are sending counsel for other parties copies of our briefs in *Diaz* and *Mow Sun Wong*.

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